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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1962**

No. 858

YACIMIENTOS PETROLIFEROS FISCALES,
*Petitioner,*
*against*
PARAGON OIL CO., INC.,
and
REPUBLIC TANKERS, S.A.,
*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The full facts in this case are set forth in the trial court's opinion (pp. A-12 through A-30 of the appendix below—Vol. I) and in the affirming opinion of the Court of Appeals for the Second Circuit, reported at 310 F. 2d 169 (pp. 2-A through 11-A of the petitioner's appendix to its brief). Respondent Paragon Oil Co., Inc. (Paragon hereinafter) therefore sees no need to burden this Court's time with a repetition of the facts and findings as therein

set forth. Suffice it to say that the gist of the trial court's decision was:

> "The failure of respondent YPF to provide libellant's vessel with a safe berth was a breach of the safe berth clause contained in the Affreightment Contract between respondent Republic and YPF and consequently a breach of the safe berth clause contained in the charter party between libellant and respondent Republic" (A-29, Appendix, below).

Petitioner has nowhere in its petition demonstrated any basis for the granting of a writ of certiorari to the Court of Appeals for the Second Circuit. While petitioner attempts to lead the Court to believe that the petition should be granted because of the presence of constitutional issues and that meritorious questions of law have been ignored by the trial and appellate courts, a short review of the background of this litigation shows that all that the petitioner now asserts has been fully dealt with below, and that there are no questions which merit consideration by this Court.

Petitioner has attempted to make complex a relatively simple and routine species of admiralty suit. This is not a case where petitioner makes out a showing that it has not had a full and thorough trial on the merits. All the claims asserted by petitioner at any time in this litigation, including those re-asserted in the petition for certiorari, were fully and properly dealt with by the courts below in accordance with well settled law. In fact, petitioner has received more attention for its contentions than would ordinarily be expected in any litigation, since in addition to the trial and review on appeal, petitioner had two separate petitions for rehearing considered by the Court of Appeals, both of them denied.

**The history of this litigation demonstrates that the petitioner does not meet the requirements for certiorari.**

The litigation here involved is a simple one. Paragon, as bareboat chartered owner of the SS GREENPOINT, filed a libel in admiralty in the United States District Court for the Southern District of New York against its charterer, respondent Republic Tankers, S.A. (Republic), and against petitioner, to recover for damage to the vessel as a result of grounding at an unsafe discharge berth in Buenos Aires designated by the petitioner. The libel was based upon the failure of petitioner and Republic to comply with a safe berth warranty and alternatively on the negligence of petitioner in designating and furnishing a known unsafe berth to the vessel. The safe berth clause of the charter party between Paragon and Republic read as follows:

> "6. SAFE BERTH. SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat; any lighterage being at the expense, risk and peril of the Charterer." (See Appendix to brief of libellant, below)

Republic admitted the existence of the safe berth clause in its charter with Paragon. The safe berth clause in the contract between Republic and YPF was identical with that contained in the Paragon charter party except for the deletion of certain language which applied only to the loading port. Republic therefore claimed that if any damage

was sustained by the vessel from grounding at the berth designated by YPF the liability was that of the petitioner, YPF. Republic thereupon moved to implead the petitioner in order to protect its right over against them.

Petitioner in unsuccessfully opposing the motion by Republic, first argued its theory of "collusion". The District Judge rejected this argument and granted the motion to implead.

Petitioner in its answer to the libel, while admitting that the vessel arrived in Buenos Aires with a cargo to be delivered to it, denied any liability either to Paragon or to Republic. The answer further pleaded as defenses the following:

1. The libel failed to state facts sufficient to constitute a cause of action;
2. Libellant was not the real party in interest;
3. The negligence, if any, was in whole or in part that of libellant;
4. Libellant assumed the risk of the grounding;
5. Petitioner was absolved of any responsibility by reason of a general "strike clause"; and
6. The fault, if any, was that of respondent, Republic.

The trial judge, after an extended trial, filed a lengthy opinion containing meticulous findings of fact and conclusions of law holding both Republic and petitioner liable. The trial court disposed of these defenses of petitioner, as well as its contentions with regard to "collusion", and pointed out that the real issue was whether there was damage to the vessel resulting from YPF's designation of an unsafe berth.

Petitioner in its appeal to the Circuit Court of Appeals, again urged its six "defenses" and again, at some length,

pressed its contentions on the alleged "collusion". It also raised, for the first time, upon the second motion for rehearing, its contentions with respect to the claimed defect in the admiralty jurisdiction of the trial court. In fact, everything that is urged in the petition for certiorari has been before the Circuit Court with one noteworthy modification in emphasis.

Petitioner, in its brief, arguments and petitions for rehearing before the Circuit Court, devoted most of its time and space to the argument on collusion and only upon the second motion for a rehearing devoted any attention to the alleged jurisdictional issue. Petitioner obviously at long last has recognized the weakness of its argument on "collusion", since it now makes it a minor point of the petition and tries to make the jurisdictional issue its major argument. However, here again nothing new is added, irrespective of the emphasis which petitioner has now tried to place on its arguments.

The Court of Appeals in its opinion thoroughly dealt with petitioner's two major arguments presently asserted in the petition. With respect to the alleged collusion the Court of Appeals stated in part:

> "* * * The Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation * * * Even if YPF is entitled to have the separate entities of the congeries of Schwartz-owned corporations disregarded, it would be liable none the less, since the ultimate responsibility to provide a safe berth rested on it; and the true party in interest would still be American. Indeed, we see no reason why libellant's direct claim

against YPF should not have been sustained, on a theory akin to the liability to the shipowner of a stevedoring company that contracts with a charterer, Crumady v. The J. H. Fisser, 358 U. S. 423, 428 (1950), or even with a consignee, Waterman S. S. Corp. v. Dugan & McNamara, Inc., 364 U. S. 421, 423-425 (1960.) *Neither are we told of any substantial defenses that an independent proctor could have interposed for Republic with any hope of success.* The main suggestion is that something could have been made of the fact that Milanowski worked also for Circle Shipping, another Schwartz-owned corporation which was agent for libellant as well as for Republic, so that any fault on his part would defeat the recovery by the former against the latter. A sufficient answer is that we discern no fault to impute." (Emphasis supplied.) (pp. 10a and 11a of appendix to petitioner's brief)

With respect to the alleged lack of jurisdiction, the Court of Appeals held that the agreement between Republic and YPF was a contract of affreightment, long a clearly recognized basis for admiralty jurisdiction. However, the Court of Appeals went further and pointed out that irrespective of the written contractual documents, there was a basis for recovery on libellant's direct claim in accordance with the principles of the *Crumady* and *Waterman* cases, cited *supra*.

The right of Paragon to a direct recovery against petitioner, and the concomitant admiralty jurisdiction to enforce same are also supported by the principles enunciated in *Nassau Sand & Gravel Co.* v. *Red Star T. & T. Co.* (CA 2 1932), 62 F. 2d 356.

That case involved a grounding of a barge at a dock designated by the charterer. There was no written safe berth clause, the barge owner relying on the fact that the

charterer having designated the berth, there was an implied warranty that it was a safe one. The Court of Appeals for the Second Circuit held that damages should be divided between the parties and reaffirmed the rule that a safe berth assurance need not be in writing in the following language:

> "The respondent does not assert that the tug was not liable for leaving the barge at another berth than that agreed upon. We are therefore concerned only with the duties of the bargee in the circumstances, and how far his faults relieve it. We have held that if he is assured that the berth is safe, and acts upon that assurance, he need not sound. The Eastchester, 20 F. (2d) 357. If he is so assured, but does not accept the assurance, and sounds, but sounds ineffectively, the damages will be divided. The Bleakley No. 76 (C.C.A.) 54 F. (2d) 530. If he has no assurance beyond the mere fact that he is given the berth, he must sound. The B.B. No. 21 (C.C.A.) 54 F. (2d) 532; Hirsch Lumber Co. *v.* Co. Ottaviano & Co. (C.C.A.) 18 F. (2d) 952; The Dave & Mose (Fahey *v.* New York), 49 F. 389 (D.C.) affirmed Fahy *v.* N. Y. (C.C.A.) 61 F. 336; Sinram *v.* Pennsylvania R. Co. (C.C.A.) 61 F. (2d) 767."

Petitioner YPF, after the Court of Appeals rendered its opinion affirming the District Court, filed a petition for rehearing. The Court of Appeals after due consideration denied this petition.

Petitioner thereafter filed a second petition for a rehearing urging the points relied upon in its present petition with equal length and verbosity. The Court of Appeals considered this second petition and denied it.

Petitioner is thus in the position of one who has unsuccessfully urged its so-called grounds for review on two

occasions before the District Court, three occasions before the Court of Appeals and now for the sixth time in its petition to this Court. Petitioner's arguments have not improved either with age or repetition.

The petitioner instead of facing the issues dealt with by the District Court and the Court of Appeals urges points of alleged international trade usages with the obvious intent of impressing upon this Court the suggestion that there is involved in this case some question of the rights of a friendly foreign sovereign, Argentina. Paragon respectfully submits that the petition has not demonstrated such issues are present, and cannot so demonstrate, since none in fact exist.

The petitioner attempts to suggest veiled intimations that its right to invoke sovereign immunity has in some way been prejudiced. Paragon submits that any such argument is specious since if petitioner seriously intended to assert sovereign immunity not only would it so state, but also, as this Court may note, its right to assert the same may be invoked whenever effort is made to collect on the judgment. *Dexter & Carpenter, Inc. v. Kungliga Jarnvagsstyrelsen, et al.* (CA 2 1930) 43 F. (2d) 705, cert. den. 282 U. S. 896.

The petition presents no special or important reasons for the granting of a writ of certiorari, nor does it raise any issue which satisfies the criteria for review established by Rule 19 of this Court.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decisions of any other court of appeals. The opinions of both courts below followed well established precedents which have consistently held a safe berth clause in the language here present to be an "express warranty" that any damage suffered by reason of furnishing an unsafe berth renders

the warrantor liable to respond to the warrantee for such damage:

*Cities Service Transp. Co.* v. *Gulf Refining Co.*, 2 Cir., 1933, 79 F. 2d 521, aff'g 9 F. Supp. 963; *Park S.S. Co.* v. *Cities Service Oil Co.*, 2 Cir., 1951, 188 F. 2d 804, cert. denied 342 U. S. 862.

The record discloses that this case does not involve an important state or territorial question; that it does not involve a decision on an important question of federal law which has not been but should be settled by this Court; nor is the decision in conflict with the applicable decisions of this Court. The courts below have not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The petition therefore does not satisfy the criteria of this Court's rule for review and therefore should be denied.

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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